

**FILED**

**SEP 25 2014**

**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

UTAH CHAPTER OF THE SIERRA CLUB,  
SOUTHERN UTAH WILDERNESS  
ALLIANCE, NATURAL RESOURCES  
DEFENSE COUNCIL, and NATIONAL  
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC and  
KANE COUNTY, UTAH

Intervenors.

ORDER CONCERNING RENEWED  
MOTION FOR LEAVE TO CONDUCT  
DISCOVERY - AWARD OF FEES  
AND COSTS

Docket No. 2009-019  
Cause No. C/025/0005

Pursuant to the Board's February 20, 2014 Interim Order Concerning Motion for Discovery, Alton Coal Development ("ACD") on March 5, 2014 filed a Petition for Award of Costs and Expenses (the "Petition"). In conjunction with the Petition, ACD filed a Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Discovery Motion"). Petitioners on April 4, 2014 filed a Motion to Dismiss Alton Coal Development's Petition for Award of Costs and Expenses ("Motion to Dismiss") as well as a Motion to Stay Discovery pending a decision on the Motion to Dismiss (the "Stay Motion"). The parties to date have filed various memoranda in connection with the Petition, Discovery Motion, Motion to Dismiss and Stay Motion. The Board, having read the above-referenced filings, hereby enters the following order concerning discovery. The ruling announced below was approved by a vote of six of seven

Board members. Board member Kelly L. Payne participated in all of the Board's deliberation sessions except one but has reviewed all pleadings and participated in the vote. Board member Payne did not support this ruling and has set forth a brief dissenting opinion below.

The parties disagree about whether an objective bad faith element is part of the controlling bad faith test applicable to the Petition. *See* Petitioners' Memorandum in Support of Motion to Dismiss ACD's Petition for Award of Costs and Expenses ("Petitioners' Brief") at 3-20 (arguing for inclusion of objective bad faith element); ACD's Memorandum in Opposition to Motion to Dismiss at 7-8 (arguing that controlling test includes only subjective bad faith element); Division's Memorandum in Response to Petitioners' Motion to Dismiss ("Division's Brief") at 2-5 (arguing that controlling test requires a showing of objective as well as subjective bad faith). All parties agree, however, that a subjective bad faith element forms a part of that test. *See* Petitioners' Brief at 3-9, 21-24; ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4; Division's Brief at 2-3, 11.

While Petitioner argues that discovery is not necessary with respect to, and would not inform, any part of the bad faith test, *see generally* Petitioners' Opposition to ACD's Renewed Motion for Leave to Conduct Discovery, the Board agrees with ACD and the Division that discovery would inform, and will be necessary to analyze, the subjective bad faith element. *See* ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4 (requesting leave to conduct discovery regarding subjective bad faith); Division's Memorandum in Response to ACD's Renewed Motion for Leave to Conduct Discovery at 2-4 (arguing that discovery is appropriate with respect to subjective bad faith element). For this reason, the Board finds that good cause exists to permit discovery.

Given that good cause exists for discovery related to the subjective bad faith element that

all parties concede is part of the controlling test, the Board authorizes ACD to conduct discovery in accordance with the Utah Rules of Civil Procedure. Following discovery, the Board will decide all issues addressed in the above-referenced briefs concerning elements of the bad faith test beyond the subjective bad faith component, as well as application of that test to the facts of this case in light of any information gained through discovery. The Board will defer any ruling on arguments made in the Motion to Dismiss<sup>1</sup> until after discovery is complete and the Board can undertake a consideration of all disputed issues.<sup>2</sup>

Although the prior filings (including ACD's proposed discovery requests and Petitioners' briefs concerning issues of privilege, proportionality, and other matters) lay out the parties' primary disagreements about the appropriate scope of discovery, the Board will rule upon discovery disputes on an ongoing basis as discovery is conducted. Once discovery requests have been generated, Petitioners may renew the arguments made in prior briefing in connection with any objections it has to the discovery requests.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Dissenting Opinion of Board Member Payne – This Board member does not join the majority in approving discovery at this time. I would prefer the Board first resolve the issues raised in the Petitioners' pending Motion to Dismiss. Those issues include whether the “bad faith” test governing a permittee's petition for attorney's fees includes elements of both objective

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<sup>1</sup> The Board agrees with ACD that the Motion to Dismiss implicates matters beyond the sufficiency of the allegations of the fee petition, and raises questions of sufficiency of proof. *See* ACD's Memorandum in Opposition to Motion to Dismiss at 3-5. The Board will address the issues raised in the Motion to Dismiss after discovery is complete.

<sup>2</sup> As ACD argued, discovery may inform the objective bad faith analysis if such an analysis forms part of the test. *See* ACD's Reply Memorandum in Support of Renewed Motion for Discovery at 7-8. The Board will consider any evidence gathered through discovery bearing on objective bad faith when the Board considers all disputed issues following the discovery phase.

and subjective bad faith, whether any objective bad faith inquiry can be decided on the basis of the existing record, and if so, whether objective bad faith can be shown in connection with any of the subject claims. Depending upon the Board's resolution of these questions, discovery into subjective bad faith may not be necessary. This Board member believes that answering those questions now, rather than deferring them for later decision after discovery is complete, is the most logical and economical way to proceed. I would therefore not authorize discovery at this time.

Issued this 25<sup>th</sup> day of September, 2014.

**UTAH BOARD OF OIL, GAS & MINING**

  
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Ruland J Gill, Jr., Chairman

## **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **ORDER**  
**CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY -**  
**AWARD OF FEES AND COSTS** for Docket No. 2009-019, Cause No. C/025/0005 to be  
mailed via E-mail, or First Class Mail, with postage prepaid, this 26th day of September, 2014,  
to the following:

Stephen H.M. Bloch  
Tiffany Bartz  
Southern Utah Wilderness Alliance  
425 East 100 South  
Salt Lake City, UT 84111  
[steve@suwa.org](mailto:steve@suwa.org)

Walton Morris  
Morris Law Office, P.C.  
1901 Pheasant Lane  
Charlottesville, VA 22901  
[wmorris@charlottesville.net](mailto:wmorris@charlottesville.net)

Karra J. Porter  
Phillip E. Lowry, Jr.  
Christensen & Jensen, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
[Karra.Porter@chrisjen.com](mailto:Karra.Porter@chrisjen.com)  
[Phillip.Lowry@chrisjen.com](mailto:Phillip.Lowry@chrisjen.com)

Sharon Buccino  
Natural Resources Defense Council  
1152 15th St NW, Suite 300  
Washington DC 20005  
[sbuccino@nrdc.org](mailto:sbuccino@nrdc.org)

Jennifer Sorenson  
Michael Wall  
Margeret Hsieh  
Natural Resources Defense Council  
111 Sutter Street, FL 20  
San Francisco, CA 94104  
[jsorenson@nrdc.org](mailto:jsorenson@nrdc.org)  
[mwall@nrdc.org](mailto:mwall@nrdc.org)  
[mhsieh@nrdc.org](mailto:mhsieh@nrdc.org)

Michael S. Johnson  
Assistant Attorneys General  
Utah Board of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
Salt Lake City, UT 84116  
[mikejohnson@utah.gov](mailto:mikejohnson@utah.gov)

Steven F. Alder  
Assistant Attorneys General  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
Salt Lake City, UT 84116  
[stevealder@utah.gov](mailto:stevealder@utah.gov)

Denise Dragoo  
James P. Allen  
Snell & Wilmer, LLP  
15 West South Temple, Suite 1200  
Salt Lake City, UT 84101  
[ddragoo@swlaw.com](mailto:ddragoo@swlaw.com)  
[jpallen@swlaw.com](mailto:jpallen@swlaw.com)

Kent Burggraaf  
James Scarth  
Kane County Deputy Attorney  
76 North Main Street  
Kanab, UT 84741  
[attorneyasst@kanab.net](mailto:attorneyasst@kanab.net)  
[kentb@kane.utah.gov](mailto:kentb@kane.utah.gov)

Bennett E. Bayer, Esq.  
Landrum & Shouse LLP  
106 W Vine St Ste 800  
Lexington KY 40507  
[bbayer@landrumshouse.com](mailto:bbayer@landrumshouse.com)

